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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RACHELLE L., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. LETTICIA R., Defendant and Appellant.	D040913 (Super. Ct. No. J10971)

APPEAL from an order of the Superior Court of San Diego County, Peter E. Riddle, Judge. Affirmed.

Letticia R. appeals an order under the Welfare and Institutions Code[1] removing her infant daughter, Rachelle L., from her custody and placing her with the infant's father,

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1 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

Hector L. She contends the allegations in the petition did not support a cause of action under section 300, subdivision (b), the evidence was insufficient to support the jurisdictional and dispositional findings, and there were reasonable alternatives to protect Rachelle's safety short of removal. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2002, the San Diego County Health and Human Services Agency (the Agency) removed two-week-old Rachelle from 17-year-old Letticia's custody and filed a section 300, subdivision (a) petition on her behalf because Letticia spanked the minor when she was only two weeks old and had a history of poor impulse control, violence, and substance abuse. At the September jurisdictional and dispositional hearing, Letticia sought to dismiss the petition because it did not state a cause of action. The court amended the petition to state it was brought under section 300, subdivision (b) and Letticia renewed her challenge to its sufficiency. The court denied that motion, found Hector was Rachelle's presumed father, made a true finding on the petition, removed Rachelle from Letticia's custody, placed the minor with Hector, and ordered the parents to comply with the case plan.

DISCUSSION

I

Letticia contends the petition did not state a cause of action. The Agency correctly states that Superior Court San Diego County, Local Rules, rule. 6.5 required her to make this objection at the detention hearing or her initial appearance. Here, Letticia appeared at the July detention hearing, but did not object to the sufficiency of the petition.

However, she did object at the jurisdictional hearing and the Agency did not contend her time to do so had passed. When the parties and the court proceed on the theory that certain issues are presented for adjudication, the parties are thereafter estopped from claiming those issues are not in controversy. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1986) 186 Cal.App.3d 94, 104.) Because the parties and the court proceeded as if the sufficiency of the petition was at issue, we address the issue here.

A dependency petition must contain "a concise statement of facts, separately stated, to support the conclusion the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted." (§ 332, subd. (f).) The petition need not "regurgitate the contents of the social worker's report," but need only present the essential facts necessary to establish jurisdiction. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 389.)

Because Letticia raises a facial challenge to the petition, we apply the rules akin to a demurrer. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1133.) We construe the well-pleaded facts in favor of the petition in order to determine whether the Agency pleaded that Letticia placed Rachelle in substantial risk of harm within the meaning of section 300, subdivision (b). (*In re Nicholas B., supra,* 88 Cal.App.4th at p. 1133.)

Here, the sustained petition alleged:

> "The child has suffered, or there is substantial risk that the child will suffer serious physical harm inflicted non-accidentally upon the child by the child's parent or guardian. [¶] COUNT 1: On or about July 26, 2002 the child's mother [LETTICIA R.], admitted spanking her daughter on or about 7/14/02, when the child was only two

> weeks of age. The mother has a history of Poor Impulse Control, violence, and polysubstance abuse including marijuana, alcohol, and methamphetamine. In 1999, the criminal court ordered the mother to attend assaultive behavior and anger management counseling after the mother struck one of her high school classmates. Despite completing the recommended services, the mother continued to exhibit poor impulse control when, in September 2000, she smashed a porcelain figurine and grabbed the broken base, threatening her mother with it. During this incident, the mother also pulled the telephone cord out of the wall and threw the phone on the ground. The mother has been hospitalized in a psychiatric facility and in, April 2000, was diagnosed as suffering from, among other things, an Impulse Control Disorder. In light of the mother's history as well as ongoing Poor Impulse Control and her failure to successfully address this issue coupled with the mother's statement about being frustrated being [*sic*] "a child raising a child" there is substantial risk the child will suffer serious physical harm inflicted non-accidentally."

These allegations are sufficient to state a cause of action. The essential facts show Letticia spanked a two-week-old child; has a history of violent behavior, substance abuse, and an impulse control disorder; and has failed to successfully address these issues. A two-week-old child is particularly vulnerable. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) A two-week-old child who is subject to the whims of a person who has already hit her, has a substance abuse problem, has an untreated anger management problem, and reacts to difficult situations with violence is at risk of harm. Thus, if true, the allegations sufficiently state a prima facie case.

II

A

Letticia contends the evidence submitted in support of the petition is not sufficient to support the court's exercise of jurisdiction over Rachelle or its order removing the

child from her custody.[2] She asserts the court improperly relied upon evidence that was several years old and psychological evaluations performed on her in another matter.

At the jurisdictional hearing, the court determines whether the child falls within any category in section 300. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.) The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

Once the juvenile court finds a child to be within its jurisdiction, it must conduct a dispositional hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1701.) At the dispositional hearing, the court may declare that child to be a dependent child of the court, and must decide where the child will live while under its supervision. (*In re Michael D.*, *supra*, 51 Cal.App.4th at p. 1082.) In order to remove a child from his or her parent's custody, there must be clear and convincing evidence that removal is the only way to protect the child. (See, e.g., *Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 248.) We review both findings in the light most favorable to the order to see if substantial evidence supports them. (*In re Shelley J.*, *supra*, 68 Cal.App.4th at p. 329.)

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2 Leticia correctly points out that the court had to make factual findings to support its removal orders. (§ 361, subd. (c).) However, if substantial evidence supports the trial court's order, any failure to state a factual basis is harmless. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218-1219.)

Here, Letticia admitted spanking Rachelle when the baby was two weeks old. She did so out of frustration because she had been unable to sleep when Rachelle cried all night. She did not know what was wrong with her or what to do. She was impatient and "a little out of control" when she spanked the child.

Letticia contends this evidence is insufficient to support a jurisdictional or dispositional finding because she was never asked what she meant by "spanking" until after the Agency removed Rachelle. This argument is irrelevant. Letticia categorized her actions as spanking, which is punitive. She told Hector what she meant by spanking is what one would to do a small child, from which we infer she was discussing punishment. There is no reason to punish a two-week-old baby. She spanked Rachelle to get her to stop crying. However, a two-week-old child is unable to understand such discipline. If Letticia continued to become frustrated with her, which is likely because generally infants cry, she would continue to hit her because she did not know what else to do and usually reacted to difficult situations with violence. Hitting an infant is likely to cause injury. (See, e.g., *Laurie S. v. Superior* Court (1994) 26 Cal.App.4th 195, 202 (*Laurie S.*) ["screaming, swearing[,] and demonstrating indifference toward an infant are acts . . . inconsistent with caregiving"].) Moreover, she did not view her actions as inappropriate because she stated, "there were no bruises."

There was also significant evidence Letticia had an untreated anger management problem. She was difficult to maintain in a public school placement because of her explosive temper and behavioral problems. In 1999, she was hospitalized after making suicidal gestures. That year, she also slapped and pushed another girl. In September

2000, she argued with her mother, Maria R., either because Maria did not give her money or would not sign a permission slip. She became angry, threw newspapers and silverware on the floor, pulled the telephone cord out of the wall, and threw the telephone on the floor so Maria could not call the police. She broke a porcelain figurine and used its broken base to threaten Maria. She was on probation for this incident. As part of her probation, she had to complete an assaultive behavior class, which she had not done.

Letticia asserts these incidents should not be considered because they occurred in the past. When considering whether to take jurisdiction over a child, the court considers whether circumstances existing at the time of the hearing place the child at risk of harm. (*In re Nicholas B.*, *supra*, 88 Cal.App.4th at p. 1134.) However, evidence of past conduct may be probative of current conditions. (*Ibid.*) Each of the events about which Letticia complains the court should not have considered occurred within the past three years and shows she reacted to situations that upset or frustrated her with violence. She has not received sufficient treatment for those tendencies. Given her tendency to react with violence in difficult situations, it is likely that she would strike or shake Rachelle, which could cause serious physical harm.

Letticia is correct that past behavior alone does not establish a risk of future harm and the court must have reason to believe those acts will continue. (*In re Nicholas B.*, *supra*, 88 Cal.App.4th at p. 1134.) Here, however, the court had reason to believe such behavior would continue because for the past three years, Letticia has reacted to difficult situations with violence and, when frustrated with her child, hit her. The court properly

considered with her past actions, because they demonstrate a pattern of untreated violent behavior.

Moreover, there is also evidence Letticia had an untreated drug problem. The 17 year old has used drugs since she was 12 years old. She tested positive for drugs in October 2001 and failed to provide a current drug sample twice after Rachelle was born. By August 2002, she had not provided a drug test on five different occasions and had been discharged from her substance abuse program. A child is in danger of harm when a parent abuses drugs. (See, e.g., *In re Ashley G.* (1988) 205 Cal.App.3d 1235, 1243; *Wainwright v. Superior Court* (2000) 84 Cal.App.4th 262, 268-269.)

In addition, there was expert psychological evidence that Letticia had an untreated anger problem. She was evaluated by a psychologist in September 2000 and a psychiatrist in April 2001 in connection with the juvenile delinquency case filed after she threatened Maria.

The psychiatrist believed Letticia had "a pattern of aggressive[,] defiant and at times anti-social behaviors since the age of 12." Despite multiple placements including juvenile hall, an aunt, her father, and a psychiatric hospital, her behavior "has continued essentially unabated." She took pleasure in describing her physical conquest of other people and justified retaliatory aggression. She was happy with her negative identity and it brought her respect. She had poor insight and poor judgment, making it unlikely she would benefit from outpatient therapy or drug rehabilitation.

Letticia told the psychologist she suffered from anger management difficulties, but minimized her history of aggression and violence. He believed she was "virtually

defenseless against the emotional crises . . . she encounter[ed]" and did not have established defense mechanisms or psychological resources enabling her to cope. To the contrary, she was prone to episodes of emotional distress and turmoil when conflict arose. He believed she did not have adequate emotional and behavioral controls and was at risk for continued acts of emotional volatility. Although Letticia asserts this evidence was too old to be relevant, she introduced no expert evidence showing these factors had been resolved.[3]

Letticia, relying upon the rationale of *Laurie S.*, *supra*, 26 Cal.App.4th at page 202, contends the court erred in admitting these evaluations because a psychological evaluation can never be used to establish jurisdiction and using it violated her due process and privacy rights. In *Laurie S.*, this court held a court may not order a parent to undergo a psychological examination solely on the basis of the parent's mental illness for purposes of determining jurisdiction in a dependency case. (*Id.* at pp. 202-203.) This is because a parent does not place his or her mental illness at issue by denying the allegations in the petition. (*Id.* at p. 202.) It is only after the court takes jurisdiction over the child is an examination of the parent's mental illness necessary to determine what services are necessary to eliminate the conditions leading to the dependency. (*Id.* at p. 203.) Here, however, the court did not order Letticia to undergo a psychological examination to

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[3] Although Leticia introduced evidence showing she was a good student, her relationship with Maria had improved, and Maria had not called her probation officer recently, this evidence did not show she had resolved her violent propensities.

determine jurisdiction; to the contrary, those evaluations already existed. Thus, *Laurie S.* is inapplicable.

Moreover, although the liberal discovery rules in dependency matters will not allow the Agency to discover information that is privileged or protected by the parent's right to privacy (*Laurie S., supra*, 26 Cal.App.4th at p. 202), when psychological evaluations are ordered in other matters, the person evaluated has no claim of privilege to them. (Evid. Code, § 1017, subd. (a); *In re Eduardo A.* (1989) 209 Cal.App.3d 1038, 1044.) Here, because the delinquency court ordered Letticia to undergo the psychological evaluations, they are not privileged. Moreover, in order for the privilege to apply, Letticia had to be the therapists' patient. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1168.) There is no evidence she was either doctor's patient.

In essence, Letticia argues lawfully obtained psychological evaluations can never be used to establish jurisdiction. This argument is unsupported by any authority. The Agency may rely upon properly obtained, nonprivileged evidence to file or prove a dependency petition. Moreover, the Agency should not ignore such evidence because doing so could place children in danger. The court properly admitted and considered the psychological evaluations.

The social worker believed Rachelle was at risk because Letticia did not have appropriate expectations for the minor, lacked parenting skills, and needed to address her substance abuse and aggressive behavior. Letticia introduced no expert evidence that her psychological problems were manageable or did not place the child at risk. Substantial evidence supports the jurisdictional and dispositional findings.

B

Letticia contends the court erred in removing Rachelle because there were other alternatives to protect the child other than removal. She asserts that Maria or Hector could have supervised her with Rachelle. She also contends Rachelle could have stayed with her if stringent warnings and supervision was in place.[4]

Here, neither Maria nor Hector was able to supervise Letticia with Rachelle 24 hours a day. Maria worked at night. Hector worked during the day, five or six days a week, 50 to 60 hours per week. Because they worked opposing shifts, they could not supervise together without sacrificing sleep. Regardless, the social worker questioned how protective Maria could be of the baby and herself when she felt unable to control Letticia due to her overly defiant and aggressively threatening behaviors. Hector was unable to supervise Letticia himself because of his work schedule. Letticia has proposed no viable solution that would protect Rachelle. The court correctly determined that there were no less restrictive alternatives available.

DISPOSITION

The order is affirmed.

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4 Letticia again challenges the absence of factual findings to support the lack of other reasonable alternatives. However, as stated above, we may imply factual findings if not expressly made by the court. (*In re Jason L.*, *supra*, 222 Cal.App.3d at pp. 1218-1219.)

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.